

Amendment No. 1 to HB0381

Harwell
Signature of Sponsor

AMEND Senate Bill No. 273*

House Bill No. 381

by deleting all language following the enacting clause and by substituting instead the following language:

SECTION 1. Tennessee Code Annotated, Section 56-6-117(g), is amended by deleting subdivision (1) and substituting instead the following language:

(1)

(A) All testimony, documents, other information in the control or possession of the department that is obtained by the commissioner in an investigation pursuant to this section shall, except as provided in subdivision (B) of this section, be confidential and absolutely privileged and shall not be subject to:

(i) §10-7-503(a) or 56-1-602;

(ii) Subpoena; or

(iii) Discovery, or be admissible as evidence in any private civil action.

(B) Notwithstanding subdivision (1)(A), the commissioner is authorized to use the testimony, documents, and other information in the control or possession of the department in the furtherance of any regulatory or legal action brought as a part of the commissioner's duties.

SECTION 2. Tennessee Code Annotated, Section 56-6-120, is amended by deleting the current section and substituting the following language:

(a) The commissioner may make investigations necessary for the proper administration of this part. For the purpose of making the investigations, the

commissioner shall have inquisitorial powers and shall be empowered to subpoena witnesses and examine them under oath; provided however, that:

(1) Any investigatory action be reasonable in scope and relevant to the administration of this part; and

(2) In the course of an investigation conducted pursuant to this chapter, the commissioner shall be given immediate and full access to all business records of a person licensed or required to be licensed under this section. The department shall endeavor to conduct its investigation in a manner that is least obtrusive to the ongoing business of the producer or insurer's business. Nothing in this part shall be limited by the language in §56-6-120(e).

(3)

(A) All testimony, documents, other information in the control or possession of the commissioner that is obtained in an investigation pursuant to this section shall, except as provided in subdivision (3)(B) of this subsection, be confidential and absolutely privileged and shall not be subject to:

(i) §10-7-503(a) or § 56-1-602;

(ii) Subpoena; or

(iii) Discovery, or be admissible as evidence in any private civil action.

(B)

(i) The commissioner is authorized to use the testimony, documents, and other information in the control or possession of the department in the furtherance of any regulatory or legal action brought as a part of the commissioner's duties.

(ii) Subject to subsection (b) below, a producer or business entity producer being investigated pursuant to this section, or counsel for said producer, may obtain from the

commissioner a copy of an Inquisitorial order or any complaint filed against the producer. Further, upon initiation of a formal proceeding against any producer, the producer shall be entitled to avail himself of any and all discovery rights available under the UAPA or Rules of Civil Procedure.

(b)

(1) Upon issuance by the commissioner of an inquisitorial order or upon receipt by the department of a written complaint against a producer or business entity producer, the department shall provide the producer or business entity producer a copy of the inquisitorial order or complaint within thirty (30) days of issuance of the order or receipt of the complaint.

(2) Before seeking a statement from a licensed producer being investigated, the department shall notify the producer that any statement may be used in an investigation or become evidence in a hearing. Failure of the department to comply with subdivision (b)(1), shall render any statement provided to the department prior to its compliance with subdivision (b)(1) inadmissible in any administrative actions against such licensed producer. However, failure to comply with subdivision (b)(1) shall not prevent the department from proceeding with any actions arising from such order or complaint. Further, nothing herein shall prevent the department from taking a statement from a licensed insurance producer prior to giving the notice required by subdivision (b)(1) as long as it is taken within thirty (30) days of the receipt of the complaint or the entry of the inquisitorial order.

(c) Upon receiving notice under subdivision (b)(1), the producer being investigated may obtain a copy of any written, formal or recorded statements made by that producer, or if a business entity producer is being investigated, the business entity producer may obtain a copy of any written, formal or recorded

statements made by any officer of the business entity producer being investigated.

(d) In the course of an investigation conducted pursuant to this chapter, the commissioner shall have the right to take the testimony under oath of any person involved in the business of insurance. Such person shall be given no less than two (2) weeks written notice of the commissioner's intent to take testimony and the place where the testimony will be taken. Upon good cause shown, and in the commissioner's sole discretion, the commissioner may provide additional time to the requester.

(e) If the commissioner requires a person to produce records, original or copies, under an investigation conducted pursuant to this chapter, and the person from whom the documents have been requested believes the request is overbroad, and will not lead to the discovery of facts relevant to the commissioner's investigation, that person may seek review of the commissioner's request. The cost of document production pursuant to this section shall be borne by the producer; however all other costs of investigation shall be borne by the department.

(f) Upon completion of the investigation, and closure of the file, the commissioner shall provide the producer or business entity producer being investigated notice of the closure and completion of the investigation within thirty (30) days of such closure or completion.

(g) In the commissioner's annual report, the department shall identify the number of open investigations, and the number of investigations closed or resolved in the prior year.

(h) Any investigation initiated under this part shall be completed within three (3) years of receiving a complaint, or the entry of an order initiating an investigation. The filing of an action under subsection (e) of this section shall toll this limitation until such time as there is a final order issued pursuant to the

Uniform Administrative Procedures Act compiled in title 4, chapter 5, and there is no judicial order staying the effectiveness of the final order. Notwithstanding the above, no action may be taken against any insurance producer by the commissioner for any alleged misconduct or other wrongful action occurring more than ten (10) years prior to the date of the initiation of the investigation or receipt of the complaint. Any investigation initiated prior to July 1, 2009, shall be completed, closed contested case action filed as of July 1, 2012.

(i) The commissioner shall make available to the public information about investigations initiated by order and being conducted pursuant to this chapter. At such time as the information is available to the insurance producer under this section, the commissioner shall disclose the names of insurance producers currently being investigated and, generally, the nature of the reason for the investigation.

(j) Any notices required by the department pursuant to this section may be transmitted electronically to the producer.

SECTION 3. Tennessee Code Annotated, Section 56-8-107(d) is amended by adding the following sentence at the end of the current section.

Notwithstanding the foregoing, any licensed producer being investigated pursuant to this section, or counsel for said producer, may obtain from the commissioner a copy of an inquisitorial order or any complaint filed against the producer and a copy of any written, formal or recorded statements made by that producer or any officer of any business entity producer being investigated. Further, upon initiation of a formal proceeding against any producer, the producer shall be entitled to avail himself or herself of any and all discovery rights available under the UAPA or Rules of Civil Procedure, if applicable.

SECTION 4. Tennessee Code Annotated, Section 56-6-112 is amended by deleting “§56-2-305” and substituting instead the language “this section”.

SECTION 5. Tennessee Code Annotated, Section 56-6-112 is amended by adding the

following language as a new subsections as follows:

(g) If, after providing notice consistent with the process established by § 4-5-320(c) and providing the opportunity for a contested case hearing held in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, part 3, the commissioner finds that any insurer, person, or entity required to be licensed, permitted, or authorized by the division of insurance pursuant to title 56, chapter 6 has violated any statute, rule or order, the commissioner may, at the commissioner's discretion, order:

(1) The insurer, person, or entity to cease and desist from engaging in the act or practice giving rise to the violation;

(2) Payment of a monetary penalty of not more than one thousand dollars (\$1,000) for each violation, but not to exceed an aggregate monetary penalty of one hundred thousand dollars (\$100,000). This subdivision (g)(2) shall not apply where a statute or rule specifically provides for other civil penalties for the violation. For purposes of this subdivision (g)(2), each day of continued violation shall constitute a separate violation; and

(3) The suspension or revocation of the insurer's, person's, or entity's license.

(h) In determining the amount of penalty to assess under this section, or in determining whether the violation was a knowing violation for the purpose of subdivision (g)(2), the commissioner shall consider any evidence relative to the following criteria:

(1) Whether the person or entity could reasonably have interpreted its actions to be in compliance with the obligations required by a statute, rule or order;

(2) Whether the amount imposed will be a substantial economic deterrent to the violator;

(3) The circumstances leading to the violation;

(4) The severity of the violation and the risk of harm to the public;

(5) The economic benefits gained by the violator as a result of

noncompliance;

(6) The interest of the public; and

(7) The person's, or entity's efforts to cure the violation.

SECTION 6. This act shall take effect on July 1, 2010, the public welfare requiring it, and shall not be retroactively applied.